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March 23, 2015

Cheryl Niemi
Washington State Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Sent by email to: swqs@ecy.wa.gov

RE: Kalispel Tribe Comments on Proposed Changes to Chapter 173-201A WAC

Dear Ms. Niemi:

Thank you for the opportunity to comment on the proposed revisions to Washington water quality standards. The Kalispel Tribe has been closely tracking development of these revisions because the existing standards undercut our members' federally protected right to subsist on fish in Reservation waters. For example, State-authorized discharges of PCBs into waters directly upstream of our Reservation have contributed to the contamination of resident fish such that Kalispel people must now choose between eating those fish to the peril of their health or avoiding those fish to the peril of their culture. Fish consumers across the state are facing a similar dilemma as consumption advisories discourage them from eating an otherwise healthy public resource. Given the cultural importance of fish to the people of the Pacific Northwest, the Tribe was hopeful that the State would do its part to put an end to this dilemma.

The revised water quality standards fall far short of the mark for two primary reasons. First, the standards are derived from public health decisions that have been compromised to assuage unsubstantiated concerns about the economic costs of complying with the new standards. The clearest example of this compromise is the decision to relax safety standards. Instead of retaining the current increased cancer risk threshold of 1 in 1,000,000, the revised standards are based on a threshold of 1 in 100,000. As there is no defensible public health justification for subjecting state residents to a tenfold increase in cancer risk, this decision appears to have been made to offset the impact of an increased fish consumption rate ("FCR") on the regulated community. Available data does not support a revised FCR of less than 175 grams/day, but a tenfold reduction in safety standards reduces the practical effect of that number to 17.5 grams/day in comparison to current safety standards. 17.5 grams/day is the minimum FCR allowed by EPA guidance and therefore a number the regulated community must live with. This end around the "FCR problem" is not only deceitful but also contrary to the Clean Water Act ("CWA"), which requires that the beneficial use of fish consumption be protected. A functional FCR of 17.5 grams/day does not allow people to safely consume fish at the rate existing data shows they do, much less the rate that they would eat fish were they not avoiding fish based on existing consumption advisories.

The revised standards' second fatal flaw is the introduction of implementation tools to delay compliance with the revised standards. Some flexibility in achieving compliance with the revised standards may have been warranted if they were derived from defensible public health decisions, but delays in compliance are wholly inappropriate when the revised standards already set such a low bar.

The first solution to the problems described above is to derive the revised standards from inputs based on sound public health decisions. At a minimum, standards—including those for mercury—should be derived from:

1. An FCR of 175 grams of fish per day.
2. An increased cancer risk threshold of 1 in 1,000,000 considering simultaneous exposures from multiple contaminants.
3. A drinking water intake of 3 L/day per EPA recommendation.
4. A mean body weight value that is representative of the Pacific Northwest Region, where obesity and median body weights are likely less than the national median and less than the 80 kg assumption used in the revised standards.
5. The reference dose factors and cancer slope factors utilized in the updated EPA-recommended criteria.
6. A relative source contribution ("RSC") of 20% (0.2) of the RfD as the default RSC consistent with EPA's guidance where there is an absence of contaminant specific data.
7. Bioaccumulation factors for appropriate trophic levels where available from the updated EPA recommended water quality criteria instead of the bioconcentration factors from outdated recommended criteria.

After the standards are revised to accurately describe what is necessary to allow people to regularly and safely consume fish from Washington, implementation tools may be necessary to allow the regulated community to achieve compliance with those standards over a reasonable period of time. If such flexibility is determined to be necessary, it should be accompanied by a structured plan containing measurable performance and interim targets that can be implemented and tracked for compliance. If current implementation tools are retained, they should be modified as follows:

Variances (173-201A-420)

1. Variances should not interfere with or replace 303(d) CWA requirements that a TMDL be developed for waterbodies where designated uses are not supported.

2. To prevent de facto removal of beneficial uses, variances should not be renewable.

3. Variances should have clearly defined schedules and any narrative targets should be accompanied by numeric targets consistent with the applicable TMDLs.

4. Variances should not include extended compliance schedules that allow dischargers to avoid implementing water quality-based effluent limits for existing sources of toxic pollution or implementing alternative discharge strategies consistent with Section 302 CWA.

Intake Credits (173-201A-460)

1. No intake credits should be allowed unless there is a TMDL in place that clearly shows that the upstream source water contaminants of concern will be lowered to meet the water quality standards and that any discharger will also meet the water quality standard at the end of pipe.

2. Under no circumstance should an intake credit allow the effective concentration of the contaminant to be higher downstream of a discharge than it is upstream as the proposed language currently allows by relying solely on mass-based calculations.

Means of Implementation (WAC 173-201A-510)

1. Allowing delays in point source pollution controls because nonpoint sources are also contributors to the problem is not appropriate. Final and interim limits in permits need to be included to meet the true toxics criteria either based on a TMDL clean-up plan or discharger specific water quality-based permit requirements.

2. Application of conventional BMPs for nonpoint sources to storm water point sources is not appropriate. Many technological options exist for pollutant removal within the collection system or at the end of pipe to meet water quality-based effluent limits.

3. Compliance schedules must not be longer than allowed by the CWA and should not be paired with a variance to allow further delay in implementing pollution controls or alternative discharge strategies.

Thank you in advance for considering these comments.

Regards,

Kenneth R. Merrill
Water Resources Program Manager
Kalispel Natural Resources